IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 530 OF 1998

The Regional Director, Employees
State Insurance Corporation,
Mumbai ..Appellants

versus

Ashoka Restaurant Bar and
Permit Room, Mumbai ..Respondents

Mr. H. V. Mehta for the Appellants.
Mr. Piyush Shah for the Respondents.

CORAM : D. G. DESHPANDE,J.

DATE : 10TH MARCH, 2005

ORAL ORDER :

1. This appeal is filed by the Employees State Insurance Corporation (hereinafter referred to as "the Corporation") challenging the order of the Employees Insurance Court, Mumbai, dated 26.2.1998 thereby declaring that the claim of the Corporation towards ESI contribution is illegal and therefore set aside.

2. The Respondents was a partnership firm it

was running a restaurant cum bar. It was covered under the provisions of Employees State Insurance Act, 1948 (hereinafter referred to as "the Act"). They continued paying the contribution till February 1987 and thereafter discontinued contribution on the ground that the strength of employees was less than 20 continuously since February 1986 for a period of one year. They therefore contended that provisions of the Act were not applicable to them and this fact was informed by them in reply to Corporation's letter dated 3.2.1989 which was a show cause notice for paying contribution for the period from March 1987 to December 1988 and for a further show cause notice for paying contribution etc.

3. Corporation contended that this stand taken by the respondents was totally wrong because there was a surprise visit paid by the Inspector and the Assistant Regional Director to the Establishment of the respondents on 20.1.1986 and 25.11.1988. It was found that there were more than 19 employees on wages but actual number of the employees was not shown. It is this report of the inspection on the basis of which the present Appeal is filed. It is contended by the counsel for the appellants that during surprise visits it was found that in a note book which was kept with watchman at the gate of the establishment, names of 17 females were shown. It

was also found that their attendance was recorded in the note book and for that purpose one page was allotted to each lady, their signatures were obtained showing their attendance on each day and this attendance was shown from August 1988 monthwise. Therefore, according to the Corporation if 17 ladies were employed by the establishment, then the number of employees employed by the respondents exceeds 20 and therefore they were liable to pay their contribution.

4. On behalf of the respondents it was tried to be contended that those ladies were members of a Ghazal party and those ladies used to visit the establishment of the respondents, they were not the employees but they were paid tips or given Bakshish by the customers of the bar and therefore they could not be said to be the "paid employees" of the establishment.

5. Counsel for the Corporation contended that the manner in which the notebook was maintained and the details and particulars, which were noted in the note book falsify the claim and contention of the respondents. He also contended that it was unbelievable that 17 ladies would be attached to the establishment without there being any guaranteed fixed income to them. He contended that the

insurance court did not take this aspect into consideration and wrongly allowed application of the respondents.

6. As against this, counsel for the respondents contended that the said report of the Inspector, referred to above, was not proved, because the Inspector who prepared the report was not examined by the Corporation.

7. He also contended that no substantial question of law is involved in the appeal and there was no material on record to show that any relationship of master and servant was there between the respondents and those 17 ladies and there was no proof of payment of salary by the respondents to the said Ghazal party. He therefore contended that order of the Employees Insurance Court was proper and need not call for any interference.

8. I do not find any substance in any of the submissions of counsel for the respondents. Regarding proof of the report, it may be true that the Inspector who prepared the report was not examined but that is not the end of the matter. In the cross examination of witness Ashok Gupta on behalf of Respondents, specific questions were asked to him about the contents of this report. His

attention was drawn to the report Exhibit 12. He admitted that Mr. Shinghvi visited, he found 9 names mentioned on page 9 of the muster roll and 17 names mentioned on page No.11 in a notebook which the security guard have, then in all there were as many as 11 questions put with reference to this report and nowhere in his reply the said witness contended that the report was false, bogus or was prepared by the Inspector to implicate the respondents and involve them under the Act. These questions and answers of witness, therefore, strongly support the case of the Corporation about their surprise visit, and non examination of the witness who prepared the report, does not affect the admissibility or credibility.

9. Second contention of the counsel for the respondents that appeal does not involve substantial question of law, also holds no water. Rejection of an important piece of evidence on totally wrong and erroneous ground, non application of mind, perversity of findings regarding such a piece of evidence, as rightly argued by Mr. Mehta can be treated in the circumstance of the case, as a substantial question of law.

10. Other contention of the respondents that there was no evidence about the master and servant

relationship between those 17 ladies and the respondents; or that there was no evidence of payment of salaries by the respondents to them, is also of no consequence. If those 17 ladies were repeatedly and frequently and at regular intervals or regularly were coming to the establishment of the respondents and giving their performances, then it cannot be said that they were doing so only for the purpose of the tips from customers. It has to be noted that this is a matter of 1987 at that time the bar or dance bars or bar conducting Ghazals and music programmes were not so much popular. There is nothing on record to show as to how many customers were daily coming, because nobody would be attached to a particular establishment of this type unless there was guaranteed source of income. 17 persons cannot put their life at stake on the income which is not at all fixed and which is fluctuating every day and every week, therefore the defence raised is suspicious and appears to be an after thought. Further, when the respondents were initially member of the scheme under the Act and subsequently they take a stand that number of employees had become less and therefore they are not governed by the said Act, then heavy burden lies upon the respondents to claim such an exemption. It is true that there is no evidence of payment by the respondents to these members of Ghazals Party but it is a matter relating

to record maintained by the respondents and if they do not make it available and obviously they cannot, because that would have falsified that stand, then the Corporation cannot be blamed. It is therefore a case where the entire defence raised by the respondents regarding 17 members of Ghazal party has to be and should be treated as not covered under the Act, is false and bogus and the inspection report, referred to above, clearly proves that those persons were employees of the respondents and therefore consequently an order of the Employees Insurance Court is liable to be set aside. In the result, I pass the following order:

ORDER :

. Appeal is allowed.

. Order of the Employees Insurance Court dated 26.2.1998 is set aside and the application filed by the Respondents stands dismissed. No order as to costs.

. Certified copy expedited.

10.3.2005 (D.G. DESHPANDE, J.)